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In the

Supreme Court of the United States

OCTOBER TERM, 1964

No. 600

AVIS B. VOORHES; WILLIAM G. VOORHES AND RUDOLPH PRESUTTI,
Appellants,

v.

JOHN DEMPSEY, GOVERNOR OF THE STATE OF CONNECTICUT, and ELLA T. GRASSO, SECRETARY OF THE STATE OF CONNECTICUT,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT.

BRIEF OF APPELLANTS IN OPPOSITION OF MOTION TO AFFIRM

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JOHN DEMPSEY, GOVERNOR OF THE
STATE OF CONNECTICUT, and ELLA T. GRASSO,
SECRETARY OF THE STATE OF CONNECTICUT,
Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF CONNECTICUT

BRIEF OF APPELLANTS IN OPPOSITION OF MOTION TO AFFIRM

I. The Use of the Mandatory Party Lever Presents Substantial Constitutional Questions.

The issue before this court at this juncture is not whether the mandatory party lever in fact violates certain constitutional rights but whether the effect of the mandatory party lever on the asserted constitutional rights presents a substantial

federal question so that this court ought to take jurisdiction of the case. *Florida v. Lime and Avacado Growers v. Jacobsen*, 362, U.S. 73, 80 S.Ct. 568 (1960); *U.S. v. Georgia Public Service Comm.*, 371 U.S. 285, 83 S.Ct. 307 (1963).

The appellants maintain that the United States Constitution guarantees to every voter a right to a ballot that is cast under absolutely secret, unbiased and non-discriminatory conditions; and that the existence of these rights and the effect thereon by the mandatory party lever presents substantial constitutional questions.

The appellants believe these constitutional issues are questions of first impression to this court as they have been unable to find any United States Supreme Court case directly discussing such rights. Nevertheless, the substantiality of the issues raised by this appeal is manifest from the facts alleged in the complaint (admitted for the purposes of this appeal), and from the statements of this court in related areas, lower federal court decisions, and state statutory and decisional law.

This court has taken jurisdiction of and decided cases claiming constitutional violations of the right to vote. *Ex Parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274; *Wiley v. Sinkler*, 179 U.S. 58, 21 S.Ct. 17, 45 L.Ed. 84; *Swafford v. Templeton*, 185 U.S. 487, 22 S.Ct. 783, 46 L.Ed. 1005; and the right to have one's vote counted equally, *U.S. v. Mosley*, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355; *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801. The appellants now ask this court to assume jurisdiction of this case which asserts an indispensable, ancillary right, the right to vote under secret and non-discriminatory conditions, so that the act of casting a ballot is free from influence and pressures of any kind. The alternative is a partial disfranchisement tending to dilute the effect of every voter's ballot.

A. THE MANDATORY PARTY LEVER VIOLATES THE RIGHT TO A SECRET BALLOT.

The appellants submit that the due process and equal protection clauses of the 14th Amendment to the United States Constitution require for all elections a secret ballot, not by force of their express words, but by their necessary implication. *U.S. v. Classic*, 313 U.S. 299, 310, 314-15, 61 S.Ct. 1031, 85 L. Ed. 1368 (1940). A secret and equal ballot is also necessarily implied by Article I, Section 2, and the 17th Amendment of the United States Constitution which provides that Representatives and Senators shall be chosen and elected by the people. *United States v. Classic*, supra. While the "manner" of holding elections is left to the states until Congress provides otherwise, Article 1, Section 4, U.S. Constitution, the state cannot thereby circumscribe these constitutional rights. Therefore, the question of what rights are so fundamental to a free choice of the people, as to be constitutionally implied, is to be resolved by the federal courts.

The right to cast a ballot is a constitutional right. *U.S. v. Classic, supra.* The only federal case discussing the right to a secret ballot is *Johnson v. Clark*, 25 F.Supp. 285 (N.D. Tex. 1938). The pertinent passage of the opinion, incorrectly and only partly quoted by the appellees, stated that:[1]

> "Furthermore, the National Constitution, Art. 1, Sec. 4, U.S.C.A. Const. art. 1, § 4, leaves the matter to the states, until and unless the Congress provides otherwise. The Congress did provide in this particular matter, Title 2, U.S.C.A. § 9, that so far as the manner is concerned, that it shall be by written or printed ballot, or by machine. This, I think, means secret ballot."
>
> "The word 'ballot' in an election provision, means a method which will insure, so far as possible, the secrecy and integrity of the popular vote."

[1] Motion to Dismiss, P. 6.

The case of *Smith v. Blackwell*, 115 F.2d 186 (4th Cir. 1940) cited by appellees and the District Court[2] which might be considered to deny a right to secrecy of the ballot, is upon analysis irrelevant on that point. That court found no justiciable controversy because the complaint did not involve the constitutionality of a state election law. Here, the appellants directly attack a Connecticut election statute as violating the right to secrecy.

Even if the *Smith* case could be considered as denying the right to secrecy, then this court would be presented with a conflict of the only two federal cases dealing with a federal right to secrecy of the ballot, clearly a substantial federal question.

The appellants contend that the generally accepted usage of the word "ballot" is now, and was at the time of the Constitutional Convention, a method of voting in secret. *State v. Keating*, 53 Mont. 371, 163 Pac. 1156[3], and further, that the right to cast a ballot, by necessary implication, includes the right to cast it in secrecy. In *Mooney v. Phillips*, 173 Tenn. 398, 118 S.W.2d 224, 226 the court stated:

> "... the prime object of constitutional provisions that voting shall be by ballot is to insure secrecy to the voter in expressing his choice as between candidates."

Every court presented with the issue of secrecy of the ballot found the right to exist at the state level.[4] These cases, while arising under various facts, all indicate that courts consider the existence of the right a substantial question worthy

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[2] Jurisdictional Statement, Appendix A, P. 15; Motion to Dismiss, P. 6.

[3] See also Websters 3d International Dictionary, CJS Elections, Sec. 201(b), 203.

[4] Representative cases: *Felt v. Edwards*, 181 Ky. 287, 204 S.W. 145 *Clark v. Quick*, 377 Ill 424, 36 N.E.2d, 563; *State v. Keating*, 53 Mont. 371, 163 Pac.1156.

not only of consideration but protection. State statutes expressly providing such a right also show the concern of lawmakers with the secrecy of the ballot.[5]

The District Court assumed, without deciding, that a right to secrecy existed but held that the party lever did not violate that right since such right extends only to the name of the candidate or party voted for and not to whether the voter split his ticket or voted a straight ticket. It concluded by saying that "For all practical intents and purposes, the Connecticut procedure is a secret ballot",[6] i.e., that no substantial question was presented by the party lever. The appellants submit that the District Court overlooked the practical aspects of the matter and also the considerations expressed by this court in *Ex Parte Yarbrough, supra*, that "It is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people, as that the original form of it should be so . . . in a republican government, like ours, . . . the temptations to control these elections by violence and corruption is a constant source of danger."

The District Court acknowledged that revelation of a split ticket might subject a voter to an accusation of lack of party fealty but found this, summarily, a "far cry from an unsecret ballot."[7] While in *Yarbrough, supra*, the high court examined the temptations to control elections in the factual setting of violence and corrupt practices, the appellants maintain that the court addressed itself with equal force, to all forms of control, including that which could readily be exercised by party officials over party members by sanctions imposed upon

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[5] E.G. Conn. Gen. Stats. § 9-242, cited in appellants jurisdictional statement, App. B, P. 17, and § 9-240, cited in Motion to Dismiss, App. 1a.

[6] Jurisdictional Statement, Appendix A, P. 16.

[7] Jurisdictional Statement, Appendix A, P. 16.

revelations of breach of party fealty. The Connecticut Supreme Court of Errors itself recognized the practical and political dangers of an unsecret ballot in *Mansfield v. Scully*, 129 Conn. 494, 501, 29 A.2d 444 (1942) where in discussing a statute concerning distinguishing marks on ballots, the court stated:

> ". . . it is designed to prevent a voter from giving information to some interested persons as to the way in which he voted, a result which might easily come about and be put to political use if the ballot could be marked, by reason of the fact that all ballots are subjected to the scrutiny of the counters, whose appointments are of a political nature . . ."

The appellants maintain further that even if the voter is, by happenstance in such circumstances that political accusations and sanctions will not influence his vote, he nevertheless has an absolute right to secrecy in the manner in which he voted, i.e., whether he split his ticket, and that no one has a right to know that fact. It is impossible to foresee what other uses can be made of information concerning the way a person voted, but the mind of man can be devious and no one should be exposed to potential opprobrium or improper influence by the disclosure of any aspect of his vote.

The appellants submit, therefore, that there is a constitutional right to a secret ballot and that a substantial question is raised whether this right is violated by Connecticut's mandatory party lever statute.

B. The Mandatory Party Lever Creates Unequal and Discriminatory Voting Rights.

The appellants also submit that under the equal protection clause of the 14th Amendment, every voter has a constitutional right to vote under conditions free from influence, bias or

pressure and that the mandatory party lever violates that right. Federal and state cases support this claim in that they recognize the right of a voter to cast his ballot under conditions free from discriminatory or confusing election devices and procedures. These judges, many of them eminent jurists, concerned themselves with this question, and their opinions are ample proof that the question presented here is a substantial one.

In *Ex Parte Yarbrough, supra,* the Supreme Court condemned "temptations to control" free elections. Accordingly, the appellants maintain that any election device or procedure that tends to influence or exert mental or psychological pressure on a voter to cast his ballot in a particular manner presents a temptation to control elections within this proscription. By addressing itself to the problem of protecting voters from control and influence, this court recognized the question as a substantial one.

As stated by Justice Douglas in *Gray v. Sanders,* 372 U.S. 368, 379-80, 83 S.Ct. 801 (1963) "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." While this case is irrelevant on its facts, it underlines the fundamental constitutional requirement that no discrimination can be allowed in the election process.

The appellants submit that a vote is not equal unless cast under circumstances which equally affect every qualified voter's ability to cast his ballot, whether enrolled in a political party, or independent. The mandatory party lever subjects an independent voter to burdensome and confusing conditions surrounding the act of casting his ballot. Unlike the voter enrolled in a major political party, the independent voter must first pull the party lever, perhaps against his will, then "unvote"

before he can vote at all. This requirement tends to apply a particular pressure on the independent elector to vote a straight party slate rather than a split ticket, and to an additional risk that an improper maneuver may result in a total loss of his vote or register in a manner other than intended.

The District Court admitted the appellants claim that the mandatory party lever discriminates against the independent voter, but it denied relief on the basis that the discrimination was not unreasonable. The appellants respectfully submit that the District Court failed to correctly assess the inequality imposed upon the voters by the mandatory party lever statutes.

The New York Court of Appeals has consistently held that

> "There must be no unnecessary discrimination between the independent and the party voter in respect to the facilities offered to him for a prompt and intelligent and ready expression of his choice." *Aurelio* v. *Cohen*, 291 N.Y. 176, 51 N.E. 2d 695, 697 (1943). *Matter of Crane* v. *Voorhes*, 257 N.Y. 298, 304, 178 N.E. 169; *Callaghan* v. *Voorhis*, 252 N.Y. 14, 168 N.E. 447, 448 (1929).

In the *Crane* case, a court composed of Justices Crane, Cardozo, Pound and Kellogg stated that:

> "In the short space of time usually taken for pulling the lever of the machine, he might not notice or have his attention called to the fact that Crane's name appeared as the candidate of that body, not upon the line where it naturally belonged, but two lines above, as the candidate of another body.
>
> The Election Law is aimed to afford facility for ready voting as well as to guard against illegal and dishonest practices. All voters within reasonable regulation must have the same opportunity or else they are disenfranchised within the spirit and meaning of the Constitution . . . Regulations and restrictions there must be, but these must apply to all alike, and not

> create conditions which make it easy for one but difficult and confusing for another." 178 N.E. at 170-71.

In *Callaghan v. Voorhis*, 252 N.Y. 14, 168 N.E. 447, 448 (1929) the same court stated:

> "Many inequalities, of course, exist by nature and perhaps by education in the electorate, but before the law, all, so far as possible, must be considered equal. The clever man has no difficulty in knowing just what to do. The law, however, recognizes that many voters unfamiliar with the machinery of politics become perplexed and confused with the size of the ballot and the number of officers to be voted for in our modern elections. Regulations and restrictions are necessary, as we have found from experience, to insure honest elections; but they become unconstitutional when they unnecessarily and unfairly restrict or prejudice one class of voters and not others."

The pressures generated by the mandatory party lever to vote a straight party ticket are increased by the Connecticut statute that requires every voter to cast his vote in a voting machine in one minute. Section 9-261, Conn. Gen. Stats., Rev. 1958, as amended. Not only must an independent voter figure out how to split his ticket, but he also must do it under the pressure of a 60 second time limit. The Illinois Supreme Court found that splitting a ballot under such a time limit presented a substantial constitutional question. *People ex rel. v. Taylor*, 257 Ill. 192, 100 N.E. 534 (1913).

The Pennsylvania Supreme Court also found substantial the argument that each voter has "a right of suffrage subject to no undue hindrance or burden not imposed on every other voter", and that the election practices reviewed produced inconvenience and confusion which practically disenfranchised many voters, in this instance party voters. *Davidowitz v. Philadelphia County*, 324 Pa. 17, 187 Atl. 585, 588, 589 (1936).

The appellants know of no necessity justifying the discrimination created by the mandatory party lever. The reason put forth by the District Court that the party lever "simplifies and speeds up the voting process for a large number of voters" may justify the availability of a party lever, but it certainly is no justification for making that use mandatory. Many voters are unsophisticated and untutored in the ways of machines and when a legislature decides to supplant the simple and easily understood paper ballot with a machine it must not impose requirements that may frighten or deter those forced to use the machine from voting their conscience. The right to a free and unpressured vote is protected for the entire spectrum of voters, and is as guaranteed to the infirm, timid and unmechanical as it is to those atune to the speed and complexity of the machine age. *Callaghan v. Voorhis, supra; In re Engle,* 8 Fed. Cas. 716, 718 No. 4488 (C.C. Md. 1877).

II. Conclusion.

The appellants respectfully submit that the question of whether or not the mandatory party lever violates the United States Constitution presents a substantial federal question to this court and respectfully prays that this court take jurisdiction of this case.

Respectfully submitted,

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